No. 92-757 and No. 92-938

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BARBARA LANDGRAF,

Petitioner,

v.

USI FILM PRODUCTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MAURICE RIVERS AND ROBERT C. DAVISON,

Petitioners,

v.

ROADWAY EXPRESS, INC.,

Respondent.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE AMERICAN JEWISH COMMITTEE, AND THE ANTI-DEFAMATION LEAGUE AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. If This Court Fails to Find the Act Retroactive, Vast Judicial Resources Will be Wasted to Preserve Disfavored Law	7
II. If the Act is not Applied to Cases Pending at the Time of its Enactment, Hundreds, if not Thousands, of Individuals Will be Left Without A Remedy for Proven Discrimination	8
III. If the Act is not Applied Retroactively, Federal Employees Will be Left Without a Real Remedy for the Discrimination They Have Suffered	13
IV. The Statutory Language and Scheme of the 1991 Act Demonstrate that Congress Intended that the Act be Applied Retroactively	15
V. This Court has Held Other Civil Rights Statutes Applicable to Pending Cases	20
A. The 1960 Civil Rights Act was Applied to Pending Cases	20
B. The 1972 Amendments to the Civil Rights Act Were Applied to Pending Cases	21
VI. Legislation Providing Procedural and Remedial Changes Traditionally Applies to Pending Cases	24
A. Procedural and Remedial Statutes are Traditionally Held to Apply to Cases Pending at the Time of Their Enactment	24

B. The Civil Rights Act of 1991 is a Procedural and Remedial Statute 26

C. The Distinction Between Procedural and Substantive Amendments Reconciles the Apparently Competing Precedent in this Court in *Bradley* and *Bowen* 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES	Page
Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975)	23
Bell v. Hood, 327 U.S. 678 (1946)	13
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)	28,29
Bradley v. School Board of Richmond, 416 U.S. 696 (1974)	28
Brown v. General Services Admin., 425 U.S. 820	23,24
Brown v. General Services Admin., 507 F.2d 1300 (2d Cir. 1974)	23
Coleman-Santucci v. Secretary, U.S. Dept. of Health and Human Servs., 754 F. Supp. 209 (D.D.C. 1991)	13
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	26
Crane v. Hahlo, 258 U.S. 142 (1922)	25
Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556 (1967)	25
Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)	25
EEOC v. Arabian American Oil Co., ___ U.S. ___, 111 S. Ct. 1227 (1991)	7
Ex Parte Collett, 337 U.S. 55 (1949)	18,25
Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S. Ct. 1028 (1992)	14
Gersman v. Group Health Association, ___ U.S. ___, 112 S. Ct. 960 (1992)	12
Gersman v. Group Health Association, 975 F.2d 886 (D.C. Cir. 1992)	9,12

Table of Authorities Continued

	Page
Howard R.L. Cook et al. v. Billington, No. 82-0400 (D.D.C. February 10, 1982)	2
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990)	28,29
Koger v. Ball, 497 F.2d 702 (4th Cir. 1974)	22
Kungys v. United States, 485 U.S. 759 (1988)	16
Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990)	27
Library of Congress v. Shaw, 478 U.S. 310 (1986)	7,18
Lorance v. AT&T Technologies Inc., 490 U.S. 900 (1989)	7,18
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	14
Martin v. Wilks, 490 U.S. 755 *reh'g denied*, 492 U.S. 932 (1989)	7,8,17
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	*passim*
Place v. Weinberger, 426 U.S. 932 (1976)	24
Place v. Weinberger, 497 F.2d 412 (6th Cir. 1974)	23,24
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	7
Sampeyreac v. United States, 32 U.S. 222 (1833)	25
Sperling v. United States, 515 F.2d 465 (3d Cir. 1975)	22,23
Timus v. Secretary of Labor, 782 F. Supp. 122 (D.D.C. 1991)	13
Turner v. Barr, 806 F. Supp. 1025 (D.D.C. 1992)	13
United States v. Alabama, 362 U.S. 602 (1960)	20,21
United States v. Alabama, 267 F.2d 808 (5th Cir. 1959)	20

Table of Authorities Continued

	Page
Vance v. Southern Bell Tele. & Tele. Co., 863 F.2d 1503 (11th Cir. 1989)	11
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	6,7
West Virginia University Hospital, Inc. v. Casey, ___ U.S. ___, 113 L. Ed. 2d 68 (1991)	7
Womack v. Lynn, 504 F.2d 267 (D.C. Cir. 1974)	22
LEGISLATIVE MATERIALS	
28 U.S.C. § 1391(b)	25
28 U.S.C. § 1404(a)	26
42 U.S.C. § 1981	*passim*
Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*	3,19
Civil Rights Act of 1991, Pub. L. No. 102-166 (1991)	*passim*
Emergency School Aid Act, 20 U.S.C. § 1617	28
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261	21
Medicare Act, 42 U.S.C. § 1395x(v)(1)(A)	29
Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*	*passim*
136 Cong. Rec. S16562 (Daily ed. Oct. 24, 1990)	10
136 Cong. Rec. S9321 (Daily ed. July 10, 1990)	10
136 Cong. Rec. S9336 (Daily ed. July 10, 1990)	10
137 Cong. Rec. S15285 (Daily ed. Oct. 28, 1991)	10
137 Cong. Rec. S15338 (Daily ed. Oct 29, 1991)	15
137 Cong. Rec. S15383 (Daily ed. Oct. 28, 1991)	9,15
137 Cong. Rec. S15392 (Daily ed. Oct. 29, 1991)	15
137 Cong. Rec. S15482 (Daily ed. Oct. 30, 1991)	15
137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991)	10

Table of Authorities Continued

	Page
137 Cong. Rec. S15489 (Daily ed. Oct. 30, 1991) .	10
137 Cong. Rec. H9548 (Daily ed. Nov. 7, 1991) ...	19
MISCELLANEOUS	
Bowman, *Public Policy: "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 82 (1991)	13
Hearings on H.R. 4000, The Civil Rights Act of 1990, Volume 1, page 366 (Feb. 1990)	10
1992 Statistical Abstract of the United States, 112th ed.	13

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INTEREST OF THE AMICI[1]

The National Association for the Advancement of Colored People ("NAACP") is a nonprofit membership organization with a substantial number of members nationwide. The NAACP has chartered affiliates in each of the fifty states of the United States. Since its founding in 1909, one of the principal goals of the NAACP has been to insure that minority group citizens have as fair and equal employment opportunities as are enjoyed by white citizens. The cases currently before this Court are of particular importance to the members and supporters of the NAACP, in view of the large number of claims that would be completely precluded by the affirmance of the decisions below. For example, the NAACP initially funded and has supported the case of *Howard R.L. Cook et al. v. Billington*, No. 82-0400 (D.D.C. February 10, 1982), which challenges conduct dating to 1974 but has not yet had a final judgment in the District Court. The outcome of the cases before this Court will have a substantial impact upon *Cook* and hundreds of other cases alleging racial discrimination.

The American Association of Retired Persons ("AARP") is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-four million members are employed, and most of them are protected by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Em-

[1] The petitioners and respondents in both cases have consented to the filing of this Brief, and copies of the parties' consent letters have been filed with the Clerk.

ployment Act, 29 U.S.C. § 621 *et seq.* One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. In pursuit of this objective, AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal Courts of Appeals.

The American Jewish Committee ("AJC") is a national membership organization founded in 1906 to protect the civil and religious rights of Jews. AJC has always believed that these rights can be secure only if they are equally secure for all Americans, irrespective of race, faith, national origin or gender. AJC, therefore, has been actively involved in the civil rights cause since its inception, and strongly supported enactment of the Civil Rights Act of 1991. AJC also urged the United States Equal Employment Opportunity Commission to rescind its Policy Guidance denying the application of the damages provisions of the Act to pending cases and pre-Act conduct. AJC believes that both the language of the Civil Rights Act of 1991 and the legislative intent behind that statute mandate retroactive application to pre-Act conduct and pending cases. AJC maintains that retroactive application is the only way to insure one of the main purposes of the Civil Rights Act of 1991: to secure new remedies for victims of discrimination.

Since 1913, the nonprofit Anti-Defamation League ("ADL") has pursued the objective set out in its Charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly in Congress, courts, and the public arena to remove barriers which have prevented individuals from enjoying fully the rights protected

by federal civil rights laws. Most recently, ADL supported the enactment of the Civil Rights Act of 1991 as an effort to redress the inequities stemming from several Supreme Court decisions. ADL believes the application of the Act to pre-Act conduct being challenged in the pending cases is consistent with the intent of Congress and is crucial to protect the interests of victims of racial, sexual, national origin, or religious discrimination.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), applies to all cases alleging discrimination in employment that were pending when the Act was passed. The statutory language and the overall scheme of the 1991 Act demonstrate that Congress intended for the Act to apply to cases pending at the time of its enactment. Moreover, retroactive application is entirely in keeping with the manner Congress and this Court have treated prior civil rights statutes. Both the Civil Rights Act of 1960 and the 1972 Amendments to the Civil Rights Act of 1964 were applied by this Court to cases pending at the time of their enactment. In light of the procedural and remedial changes implemented by the Civil Rights Act of 1991, it, too, should be applied to pending cases.

If this Court were to find that the Act does not apply to all such pending cases, enormous resources in terms of the time, money, and energy of courts, attorneys, and parties would be wasted on the interpretation of the numerous cases which were repudiated by the Act. Moreover, if the Act is not applied retroactively, thousands of individual victims of discrimination will be left without a remedy or with only

partial remedies for the wrongs that they have suffered.

ARGUMENT

Title I of the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), (the "1991 Act" or "Act") applies to all cases alleging discrimination in employment that were pending when the Act was passed. The 1991 Act creates no new substantive rights, nor does it change the substantive law of civil rights. Discrimination on the basis of race, color, religion, sex, or national origin has long been unlawful, and the 1991 Act does not alter that essential principle of American national policy. Rather, the Act provides victims of unlawful discrimination with additional remedies for the protection of their pre-existing right to be free from that discrimination.

As remedial legislation, therefore, the Civil Rights Act of 1991 applies to cases pending at the time the law was passed. Moreover, the application of the 1991 Act to pending cases is consistent with and supported by the plain language of the Act, the purposes of the Act, and the nation's long-standing policy to eradicate discrimination.

If the Act is not applied to cases pending at the time of its enactment, there will be dramatic consequences to individual victims of discrimination and to the justice system as a whole. Thousands of individuals who brought claims in good faith, based on generally accepted interpretations of laws which existed at the time their lawsuits commenced, will have those

claims rejected by courts based on subsequent statutory interpretations that have been unambiguously rejected by Congress. Thousands of individuals will find themselves without any remedy, even if a court determines that they were the victims of unlawful discrimination. Thousands of government employees will continue to be second-class citizens long after Congress has determined that their remedies for discrimination should more closely approximate those of private-sector employees. Courts at all levels will struggle with civil rights cases that must proceed on two incompatible tracks—one recognizing and proceeding in accordance with the Congressionally-mandated track of post-1991 Act cases, and the other proceeding along an out-dated and Congressionally-repudiated track of pre-1991 Act cases.[2] In order to avoid these immeasurable harms, this Court must find the Civil Rights Act of 1991 to apply to cases pending at the time of the statute's enactment.

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[2] Some cases would be fated to continue along *both* tracks. For example, in the *Cook* litigation sponsored by amicus NAACP, one phase of the case has proceeded to an interlocutory finding of liability and an interlocutory award of damages, a second phase has proceeded to an interlocutory finding of liability, and a third phase has not yet proceeded to a finding of liability or damages. Nevertheless, these three phases will likely be appealed simultaneously, presumably forcing the Court to apply pre-1991 Act law to the first phase, post-1991 Act law to the third phase, and an undetermined law to the middle phase. For example, the burdens of proof set forth in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), have already been applied to the first two phases; however, they may not apply to the third phase, despite the fact that all three phases involve many of the same individual victims of discrimination. Such confusion will ultimately result in harm to parties and to courts.

I. If This Court Fails to Find the Act Retroactive, Vast Judicial Resources Will be Wasted to Preserve Disfavored Law.

There can be no dispute that litigation consumes enormous resources in terms of time, money, and the energy of courts, attorneys, and parties. This expense is particularly great in civil rights actions, which are notoriously long and complex, frequently spanning up to a decade and encompassing classes that number up to thousands of individuals. If this Court fails to find that the 1991 Act applies to cases pending at the time of its enactment, it will in effect mandate that decades of court time, decades of parties' time, decades of attorneys' time, and millions of dollars be spent dissecting and refining a body of law—the eight cases which were reversed by Congress in the Act—which is no longer valid. Congress simply cannot be presumed to have intended a waste of judicial and other resources of this magnitude.

In the eight cases corrected by the Act, the discriminatory conduct at issue was, on average, nearly 8.7 years old by the time the cases reached the Court.[3]

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[3] *See EEOC v. Arabian American Oil Co.*, ___ U.S. ___, 111 S. Ct. 1227 (1991) (plaintiff dismissed in 1974); *West Virginia University Hosp., Inc. v. Casey*, ___ U.S. ___, 113 L. Ed. 2d 68 (1991) (disputed practice occurred in January 1986); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (plaintiff fired in 1982); *Martin v. Wilks*, 490 U.S. 755 *reh'g denied*, 492 U.S. 932 (1989) (consent decree entered in 1981; suit filed in 1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (case filed in 1974); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plaintiff denied partnership in 1983); *Lorance v. AT&T Technologies Inc.*, 490 U.S. 900 (1989) (seniority system adopted in 1979; plaintiff laid off in 1982); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (Title VII complaints filed in 1976 and 1977).

Four of those cases were carried into their second decade when they were remanded for further proceedings.

If the Act applies only to conduct occurring on or after its effective date, November 21, 1991, then courts will be forced to construe the nuances of cases like *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), for many years, long after those cases have been repudiated by Congress. Victims of discrimination will continue to be denied the protections they were promised through the Act, and the central purpose of the Act will be frustrated. Indeed, for all practical purposes, if the Civil Rights Act of 1991 is not applied to pending cases, that Act will be transformed into the "Civil Rights Act of 2000" because of the time it will take for pending cases to be resolved under the antiquated pre-1991 rules. The language that the "Act shall take effect upon enactment," Civil Rights Act of 1991,§ 402(a), would thereby be judicially rendered meaningless for thousands of aggrieved individuals. Nowhere in the volumes of legislative history for the 1991 Act did Congress evince an intent that the decisions expressly repudiated by the Act should live on in the federal courts until the next century.

II. If the Act is not Applied to Cases Pending at the Time of its Enactment, Hundreds, if not Thousands, of Individuals Will be Left Without A Remedy for Proven Discrimination.

The very real need for the Act to apply to cases pending at the time of its enactment can be seen in

a concrete examination of Section 101.[4] The principal purpose of that section is to restore the protections and remedies against intentional racial and ethnic discrimination that were lost by many Americans as a result of this Court's narrow interpretation of 42 U.S.C. § 1981 in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[5] In *Patterson*, this Court, while expressly recognizing the United States' long-standing national policy and deep commitment to the eradication of discrimination, concluded that Section 1981 did not encompass claims for discrimination in employment when those claims arose from conduct after the formation of the employer-employee relationship. *Patterson*, 491 U.S. at 171. This Court concluded that the petitioner's claim could be brought only under Title VII, 42 U.S.C. § 2000e, and because it was not, petitioner, like many other claimants under Section 1981, was left without a remedy.

Congress' reaction to the Court's interpretation of Section 1981 was swift and unanimous.[6] Both Houses

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[4] Section 101 of the Act contains no special clause discussing whether it is to be applied to cases pending at the time of the Act's enactment. Rather, by its plain language, it must be construed under the Act's general applicability clause. *See, infra*, pp. 15-19.

[5] While both of the instant cases address issues concerning discrimination in employment, a thorough review of the jurisprudence of the 1991 Act must include an examination of other factors, such as Section 101's correction of *Patterson* and that case's interpretation of the laws concerning the making, execution, and termination of contracts. This necessity is underscored by the panoply of cases which continue to try to extend *Patterson* to non-employment settings. *See, e.g., Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992).

[6] *See, e.g.*, 137 Cong. Rec. S15383 (Daily ed. Oct. 28, 1991) (Sen.

of Congress and President Bush sought to correct the Court's interpretation because of the large number of victims left without a remedy in light of the *Patterson* ruling. During the debates preceding the enactment of the 1991 Act, Congress was made aware that there were hundreds of cases—involving thousands of victims of intentional discrimination—that were being dismissed pursuant to *Patterson*. The legislative history of the Act is replete with references to Congress' desire to act in the face of the many cases alleging intentional discrimination that were being dismissed. *See* 136 Cong. Rec. S9321 (Daily ed. July 10, 1990) (Statement of Sen. Kennedy) ("Already, the Patterson decision has caused the dismissal of more than 200 claims of race discrimination in the last year. It must be overruled by this Congress."); 136 Cong. Rec. S9336 (Daily ed. July 10, 1990) (Statement of Senator Hatch). The Bush Administration decided to support correcting *Patterson* based largely on the studies that had been submitted to Congress demonstrating the sheer volume of cases that had been dismissed.[7]

Even when President Bush vetoed the Civil Rights Act of 1990, he stated his support for correcting the *Patterson* decision. *See* 136 Cong. Rec. S16562 (Daily ed. Oct. 24, 1990). With the enactment of Section 101 of the 1991 Act, Congress completed its task of restoring remedies to victims of discrimination, who, like

Jeffords); 137 Cong. Rec. S15285 (Daily ed. Oct. 28, 1991) (Sen. Seymour); 137 Cong. Rec. S15483 (Daily ed. Oct. 30, 1991) (Danforth Interpretive Memorandum); 137 Cong. Rec. S15489 (Daily ed. Oct. 30, 1991) (Statement of Sen. Leahy).

[7] *See* Statement of Donald B. Ayer, Deputy Attorney General, *reprinted in* Hearings on H.R. 4000, The Civil Rights Act of 1990, Volume 1, page 366 (Feb. 1990).

the petitioner in *Patterson*, otherwise were left with an empty right purporting to protect them from unlawful discrimination.

If this Court holds, however, that the Act does not apply to cases pending at the time of its enactment, Congress' action is largely frustrated. Mary Ann Vance is a representative of the many victims of unlawful discrimination left without a remedy after *Patterson*, if the 1991 Act is not applied to pending cases. In *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989), two different all-white juries, on two separate occasions, returned substantial verdicts for Vance, a black employee of Southern Bell. The first jury awarded Vance more than 3.5 million dollars in compensatory and punitive damages. On appeal, the Eleventh Circuit found sufficient evidence to support the determination of liability, but concluded that the damages were excessive.

Shortly after remand from the first appeal, this Court decided *Patterson*; however, the district court decided the case on remand under pre-*Patterson* law, and the second jury awarded Vance more than one million dollars. On appeal, the Eleventh Circuit applied *Patterson* retroactively to vacate the verdict, even though Congress had already enacted the 1991 Act repudiating *Patterson*. Thus, Vance, who demonstrably was the victim of unlawful discrimination in her employment, was deprived of her economic remedy calculated by a jury because of the Eleventh Circuit's application of *Patterson*, after *Patterson* was overruled by Congress.[8]

[8] Title VII is not a realistic remedy for those individuals who sought redress for employment discrimination under Section 1981

Similarly, *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992), illustrates the pitfalls of failing to apply the 1991 Act to pending cases. In that case, Alan Gersman and his company, Computer Security International ("CSI") brought suit under Section 1981 against Group Health Association ("GHA"), alleging that GHA had wrongfully terminated a contract with CSI because CSI's president was Jewish. The United States District Court for the District of Columbia held that *Patterson* barred a Section 1981 claim for discrimination in the performance of a contract, because that case limited the application of Section 1981 to the formation of a contract. The Court of Appeals affirmed that holding. Upon this Court's granting *certiorari*, *Gersman v. Group Health Ass'n*, ___ U.S. ___, 112 S. Ct. 960 (1992), the case was vacated and remanded to the Court of Appeals, in light of the Civil Rights Act of 1991.

On remand, the District of Columbia Court of Appeals stood by its decision that *Patterson* controlled, and that the Act could not be applied to *Gersman*, a case pending at the time that the statute was enacted. Thus, Gersman and CSI remained the uncompensated victims of discrimination, based on a case—*Patterson*—which Congress repudiated months before the final court decision was rendered. Unless the 1991 Act is retroactively applied to pending cases, Vance, Gersman, and many other minority Americans will have no remedy for the undisputable wrongs perpetrated upon them.

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because, in reliance on Section 1981 many did not file claims with the Equal Employment Opportunity Commission during the required time period. Therefore, those individuals would be left without any remedy at all if this Court concludes that Section 101 of the Act does not apply to pending cases.

III. If the Act is not Applied Retroactively, Federal Employees Will be Left Without a Real Remedy for the Discrimination They Have Suffered.

Another example of the crucial need for application of the Act to cases pending at the time of its enactment can be seen with regard to Section 102 of the 1991 Act. While that section does not create new substantive rights for federal employees, it does create new procedures and remedies for those workers.[9] Section 102 provides public-sector employees with compensatory damages, pre-judgment interest, and the right to a jury trial. It is unconscionable that these remedies—which merely serve to bring federal employees more in line with their private-sector counterparts—should not apply to the thousands of federal workers whose claims are pending.

In fact, this Court recently reiterated its long-standing position concerning a court's ability to award rem-

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[9] African-Americans have long represented a greater percentage of federal executive branch employment than private employment. African-Americans represent 16.6% of executive branch government employees, while they represent merely 12.1% of the national population. 1992 *Statistical Abstract of the United States*, 112th ed. This has generally been thought to be due to the desire for enhanced security in employment. *See, e.g., Bowman, Public Policy: "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 82 (1991) (discussing African-Americans and "government jobs which are valued for their security.") Yet, the federal government has been rife with discrimination, and there are literally dozens of cases in which the federal government has been found to discriminate. *See, e.g., Turner v. Barr*, 806 F. Supp. 1025 (D.D.C. 1992), *reh'g denied* 811 F. Supp. 1 (1993); *Timus v. Secretary of Labor*, 782 F. Supp. 122 (D.D.C. 1991); *Coleman-Santucci v. Secretary, U.S. Dept. of Health and Human Servs.*, 754 F. Supp. 209 (D.D.C. 1991).

edies, including damages, when a statute has been violated. Last term, this Court held:

> [W]here legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Franklin v. Gwinnett County Pub. Schools, ___ U.S. ___, 112 S. Ct. 1028, 1033 (1992), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Relying on this long-lived standard, which this Court traced back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court concluded:

> The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

Franklin, 112 S. Ct. at 1035.

The Civil Rights Act of 1991 presents precisely the sort of legislation contemplated by *Franklin*. The Act provides a "general right to sue" for violations of legal rights. In fact, the 1991 Act provides "clear direction" that a Court *should* award appropriate relief to civil rights plaintiffs. Thus, under this Court's own recently reiterated precedent, the remedial provisions of the Civil Rights Act of 1991 should be applied to cases pending at the time of enactment.[10]

[10] Lest employers argue that retroactive application 0f the Act would submit them to undue hardship, Congress reflected its would submit them to undue hardship, Congress reflected its concern for costs to discriminating employers by capping the damages that are available under Section 102 of the Act. This cap shows a careful and deliberate effort to balance the equities between full vindication of an employee's existing rights and the concerns of employers. The legislative debates are replete with references regarding the inadequacy of the remedial scheme of Title VII as it previously existed, and no one suggested that only future victims of discrimination deserve adequate remedies. *See* 137 Cong. Rec. S15338 (Daily ed. Oct 29, 1991) (Sen. DeConcini); 137 Cong. Rec. S15383 (Daily ed. Oct. 29, 1991) (Sen. Jeffords); 137 Cong. Rec. S15392 (Daily ed. Oct. 29, 1991) (Sen. Daschle); 137 Cong. Rec. S15482 (Daily ed. Oct. 30, 1991) (Sen. Gore).

IV. The Statutory Language and Scheme of the 1991 Act Demonstrate that Congress Intended that the Act be Applied Retroactively.

The appropriateness of applying the 1991 Act to pending cases is confirmed by the plain language of the Act. Section 402, entitled "Effective Date," unambiguously provides in subsection (a):

> Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

Civil Rights Act of 1991, § 402(a). This plain instruction to apply the Act immediately upon enactment to pending matters as well as future conduct is confirmed by the over-arching statutory scheme.

Consistent with the command of Section 402(a), certain provisions of the Act are expressly not retroactive. Section 109, which concerns the protection of American citizens employed abroad by American companies, expressly provides:

> [T]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Section 109(c). This subsection would be mere surplus verbiage if the plain language of Section 402(a) of the Act is not given effect.

Similarly, Section 402(b) excludes from the entire Act certain disparate impact cases commenced and decided before the Act was enacted, providing:

> Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

Civil Rights Act of 1991, § 402(b). Thus, section 402(b) exempts from the retroactive application of the Act a narrowly defined class of cases. If the Act were not intended generally to have retroactive application, Section 402(b), like Section 109(c), would be wholly superfluous.

Any argument that the 1991 Act applies to prospective conduct or cases only necessarily negates the plain language and effect of Sections 109(c), 402(a) and 402(b), and disregards the fundamental principle of statutory construction forbidding interpretations that would render any provisions of an act a nullity. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (J. Scalia) ("the cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant"). The only interpretation of the 1991 Act that gives effect to *all* the words and clauses enacted by Congress, is that the Act is to be applied to all pending cases except where the Act expressly provides otherwise. Significantly, this interpretation of the Act as a whole also gives effect to the plain language of Section 402(a).

In contrast to Congress' express exceptions from immediate application, several provisions of the Act clearly require retroactive application of the Act. Section 101's correction of *Patterson* and Section 102's closing of several remedial loopholes for federal employees both indicate by their plain language that they apply to pending cases. Construing either of these sections to apply only to cases after the Act's enactment would rule out thousands of cases, permitting the perpetuation of unlawful discrimination. Absent a special retroactivity provision like Section 109(c) or Section 402(b), Section 101 and 102 can only function properly under the Act's general retroactivity provision, Section 402(a).

Section 108 of the Act responds to *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), by limiting challenges to litigated and consent judgments and orders resolving employment discrimination claims where the challenging party had sufficient notice and an opportunity to be heard, "prior to the entry of the judgment or order." This section clearly is worded so as to protect existing as well as future judgments and orders where the statutory conditions are met—obviously protecting conduct that occurred prior to the enactment of the Act. Construing the Act as prospective would leave existing consent decrees and orders open to challenge in perpetuity, keeping *Martin v. Wilks* alive. Like Sections 101 and 102, Section 108 does not contain any special retroactivity provisions, but can only function properly under the general retroactivity of the statute pursuant to Section 402(a).

Section 112 restores the right to challenge existing discriminatory seniority systems adopted long ago, as long as the charging party becomes subject to the system or is affected by it within the period of limitations. Again, unless the statute applies to pending cases and conduct, Section 112 would be rendered largely meaningless and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which limited such challenges, would live on. Like Sections 101, 102, and 108, Section 112 contains no special rule providing for immediate application but presumes through Section 402(a) application to conduct occurring before the date of enactment.

Section 113 of the Act allows the award of expert fees in Title VII actions and "in any action" or proceeding under 42 U.S.C. § 1981 or the new Section 1981A. It would be extraordinary to read this broadly-worded provision as not allowing future awards of expert fees in cases filed before November 21, 1991, or not allowing awards for the part of the expert's services that were performed before that date. As this Court recognized in *Ex Parte Collett*, 337 U.S. 55, 58 (1949), the reach of language such as "in any action" is unmistakably long. Thus, as with the other provisions noted above, this section assumes a general rule of retroactivity under Section 402(a).

Section 114 of the Act governs cases against federal agencies under Section 717 of the Civil Rights act of 1964, as amended, 42 U.S.C. § 2000e-16, and overrules *Library of Congress v. Shaw,* 478 U.S. 310 (1986), by providing that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Where the central purpose of Congress is to provide compensation for

delay in payment, it would be an unusual construction that a future award of interest cannot compensate for delay occurring before November 21, 1991. Section 114 contains no special provision requiring retroactive application to pending cases and conduct; it too functions under the general rule of retroactivity in Section 402(a).

Finally, Section 115 of the Act changes the statute of limitations period for claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"), to ninety days from receipt of the Equal Employment Opportunity Commission's ("EEOC") termination notice. The undisputed purpose of this amendment was to "avoid[] the problems created by current law . . . ." 137 Cong. Rec. H9548 (Daily ed. Nov. 7, 1991). As with the procedural amendment of Section 113, it would be incongruous to interpret Section 115 to perpetuate the problems that had been caused by the ADEA's former statute of limitations. Section 115, like the other sections containing no explicit retroactive provision must be deemed to apply to cases pending at the time of its enactment.

Thus, the statutory scheme of the Act reinforces the clear congressional mandate in Section 402(a) that provides a general rule of retroactive application to pending cases, unless otherwise specifically provided by the Act. No provisions are written in a matter which assumes a contrary reading of Section 402(a). Immediate application offers the only interpretation that would provide coherence and meaning to the statute as a whole.

V. This Court has Held Other Civil Rights Statutes Applicable to Pending Cases.

The application of the Civil Rights Act of 1991 to cases pending at the time of its enactment follows a long course of tradition with regard to the retroactivity of civil rights statutes.

A. The 1960 Civil Rights Act Was Applied to Pending Cases.

Significantly, more than three decades ago, this Court held the Civil Rights Act of 1960 applicable to pending cases. In *United States v. Alabama*, 362 U.S. 602 (1960), an action had been brought against the State of Alabama for alleged racially discriminatory conduct by the Board of Registrars of Macon County, Alabama. The action was dismissed by the District Court on the grounds that, *inter alia*, the state was not a "person" subject to suit under the Civil Rights Act of 1957. The District Court's ruling was affirmed by the Court of Appeals. *United States v. Alabama*, 267 F.2d 808 (5th Cir. 1959). By the time the case was heard by this Court, however, the Civil Rights Act of 1960—which expressly authorized such actions—had been passed by Congress. Four days after the matter was heard by this Court, the 1960 Act was signed by the President.[11] This Court, ten days later, vacated the judgments of the District Court and the Court of Appeals and remanded the action, explaining:

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[11] *United States v. Alabama* was heard by this Court on May 2, 1960. The Civil Rights Act of 1960 was signed by the President on May 6, 1960. This Court decided *United States v. Alabama* on May 16, 1960. 362 U.S. at 602, 604.

> Under familiar principles, *the case must be decided on the basis of law now controlling*, and the provisions [of the Civil Rights Act of 1960 authorizing such actions] are applicable to this litigation. . . . [B]y virtue of the provisions of that section the District Court has jurisdiction to entertain this action against the State.

United States v. Alabama, 362 U.S. at 604 (emphasis added) (citations omitted). The same rule should control the current incarnation of civil rights law—the Civil Rights Act of 1991 should apply to cases pending at the time of its enactment.

B. The 1972 Amendments to the Civil Rights Act Were Applied to Pending Cases.

Following this Court's lead in *United States v. Alabama*, numerous courts have held remedial civil rights statutes to be retroactive because of their procedural nature. The issue again arose with regard to the 1972 Amendments to the Civil Rights Act of 1964, upon the passage of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, (the "1972 Amendments"). Title VII of the Civil Rights Act of 1964 forbade employment discrimination on the basis of race, color, religion, sex, or national origin; however, until enactment of the 1972 Amendments, Title VII did not provide federal employees with access to the federal courts to protect those rights.[12]

The issue of whether the 1972 Amendments applied to actions pending administratively on the effective

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[12] The 1972 amendments expressly provided federal employees with a remedy in federal district court upon exhaustion of their administrative remedies. *See* 42 U.S.C. § 2000e-16(c) (1992).

date of the act was addressed by the Court of Appeals for the Fourth Circuit in *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974). Holding that the 1972 Amendments applied to cases pending at the time of enactment, the court explained:

> The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination. Section 717(c) simply created a new remedy for the enforcement of this existing right.
>
> * * * *
>
> *Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment.* Of course, retrospective application is not allowed when it will work a manifest injustice by destroying a vested right. But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.

497 F.2d at 705-706 (emphasis added) (citations omitted).

Other circuits soon adopted the holding and rationale of *Koger*. In *Womack v. Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974), the District of Columbia Circuit expressly adopted the reasoning of *Koger* and held that the statute was remedial and applied retroactively to pending cases. In *Sperling v. United States*, 515 F.2d 465 (3d Cir. 1975), the Third Circuit expressly agreed with the reasoning of *Koger* and held that the amendments were "a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment." 515 F.2d at 473 (footnote omitted). In *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975), the Seventh Circuit cited *Koger* and concluded that "Congress, in enacting the 1972 Amendments, was merely providing an additional remedy to enforce a preexisting right."

In *Brown v. General Servs. Admin.*, 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976), the Second Circuit analyzed arguments in favor of the retroactive application of the 1972 Amendments, and the arguments against. The Second Circuit concluded: "So far as the statutory language and relevant legislative history are concerned, retroactive application . . . would appear to be appropriate . . . [and] [i]n view of the policy of the federal government against discrimination in federal employment . . . such retroactive application of the statute appears sound." 507 F.2d at 1306. On appeal, this Court expressly recognized the Second Circuit's holding that the 1972 Amendments applied retroactively to pending cases and noted: "The parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it." *Brown v. General Servs. Admin.*, 425 U.S. 820, 824 n.4.

In fact, the only circuit to hold that the 1972 Amendments were not applicable to pending actions was the Sixth Circuit. In *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974), the Sixth Circuit held that the provisions of the 1972 Amendments which were silent on the issue of retroactivity must be held to

be prospective only.[13] The Sixth Circuit's ruling however, was vacated by this Court with express reference to footnote four in *Brown v. General Servs. Admin.*, ordering:

> [Petition for writ of] [c]ertiorari granted, judgment vacated and case remanded to the Court of Appeals for the Sixth Circuit for further consideration in light of *Brown v. General Services Administration*, 425 U.S. 820, 824 n.4 (1976).

Place v. Weinberger, 426 U.S. 932 (1976). Thus, this Court once again recognized the special application of civil rights legislation to cases pending at the time of its enactment.

VI. Legislation Providing Procedural and Remedial Changes Traditionally Applies to Pending Cases.

A. Procedural and Remedial Statutes are Traditionally Held to Apply to Cases Pending at the Time of Their Enactment.

Even beyond the area of civil rights legislation, this Court has repeatedly held that statutes enacting procedural and remedial measures apply to cases pending

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[13] Even applying the Sixth Circuit's analysis of the 1972 Amendments to the 1991 Act, the 1991 Act should be held retroactive. In *Place v. Weinberger*, the Sixth Circuit concluded that Congress' express provision in the act for Sections 11 and 14 to be retroactive to pending claims coupled with Congress' silence on the other sections indicated that those other sections should have prospective application only. 497 F.2d at 414. In the 1991 Act, by contrast, Congress expressly provided that Sections 109(c) and 402(b) will have only *pro*spective application. Thus, even by the Sixth Circuit's logic in *Place*, Congress' silence as to the remaining sections of the 1991 Act indicates that such sections should have retroactive application.

at the time of enactment. Over one and a half centuries ago, this Court wrote:

> [C]onsidering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided by this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.

Sampeyreac v. United States, 32 U.S. 222, 239 (1833). This conclusion is based, at least in part, on the theory that "[n]o one has a vested right in any given mode of procedure . . ." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922).

This reasoning has been followed through the decades. In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464-65 (1921), this Court held that injunctive relief, made available because of the enactment of Section 1 of the Clayton Act, applied to cases pending at the time the law was enacted. In *Ex Parte Collett*, 337 U.S. 55, 71 (1949), this Court held that the previously unavailable doctrine of *forum non conveniens*, made available by the enactment of the 1948 revisions to the Judicial Code, applied to cases pending at the time the act became effective. In *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967), this Court held the 1966 amendment to the general venue provisions of 28 U.S.C. § 1391(b) applied to pending cases, explaining "[t]his amendment does not change the substantive law applicable to this lawsuit. It is wholly procedural . . . As this Court said in applying

28 U.S.C. § 1404(a) to pending actions, 'No one has a vested right in any given mode of procedure.' " (citation omitted).

Like the statutes involved in those cases, the 1991 Act creates no new or different rights for victims of discrimination. It is well-recognized that the right to be free from unlawful discrimination in employment existed long before the enactment of the 1991 Act. Moreover, Congress expressly declared the elimination of discrimination to be the policy of this country as long ago as 1866 when the first civil rights statute was passed in the wake of the Civil War. Thus, the 1991 Act was enacted to protect further those long-standing rights, altering the remedies and procedures available to insure that employees are free from unlawful discrimination.

B. The Civil Rights Act of 1991 is a Procedural and Remedial Statute.

The 1991 Act, on its face, provides procedural and remedial measures to combat unlawful discrimination. The starting point for interpretation of any statute is the law's plain language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Civil Rights Act of 1991 is no exception. The plain language of the Act demonstrates the statute's remedial purpose and effect. Section 2 of the Act, entitled "Findings," specifically provides in relevant part:

> The Congress finds that—
>
> (1) *additional remedies* under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

Civil Rights Act of 1991, § 2 (emphasis added). Similarly, Section 3 of the Act, entitled "Purposes," provides in relevant part:

> The purposes of this Act are—
>
> (1) to provide *appropriate remedies* . . .
>
> (2) *to codify* the concepts of 'business necessity' and 'job related' . . .
>
> (3) *to confirm* statutory authority . . .

Civil Rights Act of 1991, § 3 (emphasis added). Thus, it is plain from the language of the statute itself that Congress did not set out to enact legislation creating new rights for employees or to make unlawful previously lawful conduct.

The specific provisions of the 1991 Act further confirm the remedial purpose of this legislation. Title I of the Act is entitled pointedly: "Federal Civil Rights Remedies." Section 102 provides for and regulates the award of damages and the availability of jury trials. Section 103 provides for the recovery of attorneys fees. Section 105 codifies burdens of persuasion and proof in disparate impact actions. Section 113 provides for the recovery of expert fees. Section 114 provides for the recovery of interest and the extension of the limitations period. There can be no debate that such remedial provisions should be held to apply retroactively. *See, e.g., Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) (holding burden of proof to be remedial for purposes of retroactivity.)

None of these provisions creates new substantive rights for employees. None makes unlawful otherwise lawful conduct by employers in their employment

practices. None diminishes or destroys vested rights of employers. Instead, the provisions of the Act modify the procedures and remedies available to employees in actions to enforce their pre-existing right to be free from unlawful discrimination.

C. The Distinction Between Procedural and Substantive Amendments Reconciles the Apparently Competing Precedent in this Court in *Bradley* and *Bowen*.

The distinction between legislative changes which are procedural and those which are substantive reconciles two lines of precedent in this Court termed in "tension" and in "conflict" with one another. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Those two branches of decisions are represented on the one hand by *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974), in which this Court applied a new law to pending cases, and *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), in which this Court declined to so apply a new law.

In *Bradley v. School Bd. of Richmond*, this Court considered the Emergency School Aid Act, 20 U.S.C. § 1617, which was promulgated as part of the Education Amendments of 1972, permitting the recovery of expenses and attorneys' fees for services rendered in a school desegregation case. This Court concluded that the Amendments should be applied retroactively, and that the petitioners should be entitled to recover expenses and attorneys' fees incurred in the pursuit of their claim. Clearly, under the procedural and substantive classification system, expenses and attorneys' fees are remedial measures. *See supra* at p. 24-26. Moreover, any statute which legislates such remedies must be considered procedural. Thus, *Bradley* could have

been decided identically under the procedural and remedial analysis illuminated above.

By contrast, *Bowen v. Georgetown University Hosp.* involved the application of the Medicare Act, 42 U.S.C. § 1395x(v)(1)(A). Under that statute, seven hospitals were required to repay over two million dollars to the federal government several years after the money had been paid out to the hospitals as Medicare reimbursement payments, in accordance with a reimbursement schedule that had a retroactive reach of three years. This Court concluded, without reference to *Bradley*, that such payments would be inappropriate. When viewed under the procedural and remedial distinction set forth above, the millions of dollars received by the hospitals as reimbursements plainly were seen by the majority in *Bowen* to have become vested and thus constituted a substantive right. The repayment of that sum was a substantive amendment to the hospitals' rights. As such, the reimbursement schedule could not be applied retroactively.[14] Thus, if this Court should hold the 1991 Act to apply to cases pending at the time of its enactment, it can reconcile the "apparent tension" between the *Bradley* and *Bowen* lines of cases.

CONCLUSION

Given this Court's long history of applying civil rights statutes to cases pending at the time of their enactment, and given the plain language of the Civil

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[14] The procedural and substantive distinction need not be applied to determine the retroactivity of a statute which states clearly on its face, as does the Civil Rights Act of 1991, whether it is to be applied retroactively. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

Rights Act of 1991, the Act should apply immediately. If such application is not made, untold thousands will suffer the unjust dismissal of their claims and the inability to obtain any remedy for unlawful conduct by discriminating employers. Moreover, the judicial system will be clogged with cases that must be decided under long-repudiated law, and valuable judicial resources will be wasted for years to come. The Civil Rights Act of 1991 should be applied to cases pending at the time of its enactment.

Respectfully submitted,

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